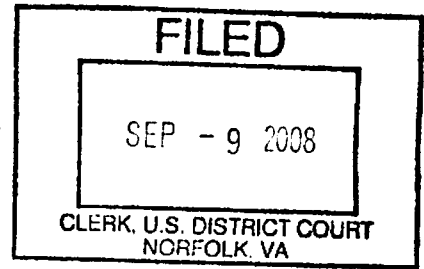


UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division



BILLY AUSTIN, #333347,

Petitioner,

v.

ACTION NO. 2:08cv224

GENE M. JOHNSON, Director of the
Virginia Department of Corrections,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to Petitioner's conviction on March 10, 2004, in the Circuit Court of Accomack County, Virginia, for possession of a firearm by a convicted felon and brandishing a firearm. Petitioner was sentenced to a term of imprisonment of five (5) years and two (2) months.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The report of the Magistrate Judge was filed on August 1, 2008 ("Magistrate Judge's Report and Recommendation"), denying Petitioner's motion for an evidentiary hearing and recommending dismissal of the petition. By copy of the report, each party was advised of his

right to file written objections to the Magistrate Judge's Report and Recommendation. On August 14, 2008, the Court received Petitioner's Response to the Report and Recommendation of the United States Magistrate Judge ("Petitioner's Objections"). The Court received no response from Respondent.

The Court, having reviewed the record and examined the objections filed by Petitioner to the Magistrate Judge's Report and Recommendation, and having made de novo findings with respect to the portions objected to,¹ does hereby ADOPT AND APPROVE the findings and recommendations set forth in the Magistrate Judge's Report and Recommendation filed on August 1, 2008, and it is, therefore, ORDERED that the petition be DENIED AND DISMISSED WITH PREJUDICE and that judgment be entered in favor of Respondent.


¹Austin, in his objections, asks the Court to "look to the numerous [sic] inconsistencies [sic] in the testimony of the [s]tate's sole eyewitness to this alleged crime." Petitioner's Objections, at 2. Austin asserts that he "is not asking the Court to 'reconsider the credibility of witnesses at his trial'", Id. (citing Magistrate Judge's Report and Recommendation). The basis for Austin's insufficiency of evidence claim, however, is that no "rational trier of fact" could find him guilty based upon the testimony of Rhonda Moore. Id.

As the Magistrate Judge correctly noted, "[a] federal court's review of such claims 'is not meant to consider anew the [fact finder's] guilt determination or to replace the state's system of direct appellate review.'" Magistrate Judge's Report and Recommendation, at 12 (citing Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998)). When conducting a review, the Court will presume correct "a determination [of] a factual issue by a State court," and the burden is on a petitioner to rebut that "presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(d)(2); see also Tucker v. Ozmint, 350 F.3d 433, 439 (4th Cir. 2003), cert. denied, 541 U.S. 1032 (2004).

Accordingly, the Court FINDS that the grounds set forth in claims 1 is DENIED as Petitioner has failed to show either that the Supreme Court of Virginia unreasonably determined the facts or unreasonably applied federal law in dismissing these claims.

Petitioner may appeal from the judgment entered pursuant to this final order by filing a written notice of appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from the date of entry of such judgment. Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right." Therefore, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of appealability. See Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003).

The Clerk shall mail a copy of this Final Order to Petitioner and to counsel of record for Respondent.

/s/
Rebecca Beach Smith
United States District Judge 
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

September⁹, 2008